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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO BAUTISTA, Defendant and Appellant.	F068100 (Super. Ct. No. F13904613) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Houry A. Sanderson, Judge.

Danalynn Pritz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Poochigian, Acting P.J., Detjen, J. and Peña, J.

A jury convicted appellant Francisco Bautista on four counts of lewd and lascivious conduct with a child under the age of 14 (Pen. Code, § 288, subd. (a)).[1]

On appeal, Bautista contends the imposition of mandatory sex registration violates the equal protection clauses of the federal and state Constitutions. We affirm.

FACTS

In March 2012, thirteen-year-old A.V. met Bautista, who was then 20 years old, when he began talking to her as she waited for a friend outside the friend's apartment. On March 25, 2012, Bautista called A.V. on her mother's cell phone and they agreed to meet at her apartment. However, when Bautista got there, they walked to the backyard of one of several vacant houses located across the street from A.V.'s apartment, where they talked and drank a beer that Bautista brought. Bautista and A.V. also had intercourse twice and they performed oral sex on each other. Afterwards they kissed goodbye and A.V. went home. A.V. did not see Bautista after that day.

On March 27, 2012, Bautista called A.V. and her mother answered. When she asked who he was, Bautista initially identified himself as a 15-year-old boy named Daniel, and then as a teacher's aide in A.V.'s classroom. The morning after the phone call, A.V.'s mother confronted A.V. and she admitted having sex with Bautista, whom she referred to as Jose Reyes. A.V.'s mother then went to the backyard of the vacant house across the street that her daughter described and found a beer bottle, two condom wrappers and four unused condoms.

On August 27, 2013, the district attorney filed a first amended information that charged Bautista with four counts of lewd and lascivious conduct with a child under the age of 14.

On August 30, 2013, a jury convicted Bautista on all counts.

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[1] All statutory references are to the Penal Code unless otherwise indicated.

On September 30, 2013, the court sentenced Bautista to a six-year prison term. It also ordered him, without objection, to register as a sex offender pursuant to section 290.

DISCUSSION

Preliminarily, we conclude that Bautista forfeited his right to challenge the order requiring him to register as a sex offender by his failure to object to the imposition of this requirement in the trial court on equal protection grounds. (Cf. *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061.) Nevertheless, even if this issue were properly before us, we would reject it.

> "The Fourteenth Amendment to the United States Constitution and article I, section 7, subdivision (a) of the California Constitution both prohibit the denial of equal protection of the laws. 'The equal protection guarantees of [both Constitutions] are substantially equivalent and analyzed in a similar fashion' [citation], and they unquestionably apply to penal statutes [citation].
>
> """Broadly stated, equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws [that] is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in their pursuit of happiness.' [Citation.]" [Citation.] .... Thus, ... a threshold requirement of any meritorious equal protection claim "is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. [Citation.]" [Citation.] "This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.'"""" (*People v. Cruz* (2012) 207 Cal.App.4th 664, 674.)

"[*People v.*]*Hofsheier* [(2006) 37 Cal.4th 1185] interpreted the federal and state equal protection clauses as invalidating mandatory sex offender registration for a 22-year-old defendant convicted of nonforcible oral copulation with a person 16 years of age (§ 288a, subd. (b)(1)), for the reason that a same-aged defendant convicted of unlawful sexual intercourse with a same-aged minor (§ 261.5) is subject to discretionary registration. [Citations.] Although *Hofsheier* attempted to limit its holding to the factual circumstances before it, the Courts of Appeal have extended *Hofsheier's* reach to

additional sex crimes involving adult offenders and minor victims of various ages and age differences, including crimes involving offenders 30 years or older or victims under 16 years of age." (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 874-875, fn. omitted (*Johnson*).)

In *Johnson*, a 27-year-old defendant was convicted in 1990 of nonforcible oral copulation with a minor under the age of 16 in violation of section 288a, subdivision (b)(2). (*Johnson*, supra, 60 Cal.4th at pp. 875-876.) Citing *Hofsheier* and its progeny, in 2011, the defendant filed a petition for a writ of mandamus seeking to be removed from the sex offender registry and from future registration obligations. Although the superior court denied the petition, the Court of Appeal reversed the superior court's judgment. (*Johnson*, *supra*, 60 Cal.4th at p. 876.)

In reversing the Court of Appeal's judgment, the Supreme Court overruled *Hofsheier*. In doing so, the Supreme Court found that "the very real problem of teen pregnancy and its costly consequences, as well as legislative concern that stigmatization might interfere with employment opportunities and the support of children conceived as a result of unlawful intercourse, offer more than just plausible bases for treating section 261.5 offenders differently than other types of sex offenders. Providing for discretion in section 261.5 cases allows the trial court to order registration in appropriate situations, while maintaining flexibility in those cases where, for instance, registration might cause economic or other hardship to a child born to the minor victim and the adult offender." (*Johnson*, *supra*, 60 Cal.4th at p. 886.) Thus, the court found *Hofsheier's* constitutional analysis faulty in particular because "it mistakenly concluded that no rational basis exists for subjecting intercourse offenders and oral copulation offenders to different registration consequences. Although *Hofsheier* accepted the reasonableness of the Legislature's determination that, generally, mandatory registration promotes the policy goals of preventing recidivism and facilitating surveillance of sex offenders who prey on underage victims, the decision failed to adequately appreciate that, among sex offenses, intercourse

is unique in its potential to result in pregnancy and parenthood. Given that unique potential, legislative concerns regarding teen pregnancy and the support of children conceived as a result of unlawful sexual intercourse provide more than just a plausible basis for allowing judicial discretion in assessing whether perpetrators of that crime should be required to register, while mandating registration for perpetrators of other nonforcible sex crimes." (*Johnson, supra,* 60 Cal.4th at p. 875.) *Johnson* also disapproved of Court of Appeal decisions extending *Hofsheier*, including *People v. Ranscht* (2009) 173 Cal.App.1369 (*Ranscht*). (*Johnson, supra*, 60 Cal.4th at p. 888.) The Supreme Court's reasoning in *Johnson* for its conclusion that mandatory registration for a violation of section 288a, subdivision (b)(1) does not violate equal protection applies with equal force to mandatory registration for a violation of section 288, subdivision (a). Additionally, we note that several decisions predating *Johnson* held that *Hofsheier's* analysis did not invalidate the mandatory registration requirement for violations of section 288, subdivision (a). (See, e.g., *People v. Tuck* (2012) 204 Cal.App.4th 724, 738; *People v. Alvarado* (2010) 187 Cal.App.4th 72, 77; *People v. Anderson* (2008) 168 Cal.App.4th 135, 142.)

The *Johnson* court also explained that "[a] decision of a court overruling a prior decision is typically given *full retroactive effect.* [Citation.] Despite this general rule, the federal and state Constitutions do not prohibit an appellate court from restricting retroactive application of an overruling decision on grounds of equity and public policy." (*Johnson, supra,* 60 Cal.4th at p. 888, italics added.) Additionally, the *Johnson* court saw no reason to deny retroactive application of its decision "where ... a sex offender has taken no action in *justifiable* reliance on the overruled decision." (*Id.* at p. 889, italics added.)

In his opening brief, Bautista relied on *Hofsheier, supra*, 37 Cal.4th 1185 and *Ranscht, supra*, 173 Cal.App.1369 to contend that the mandatory sex offender registration the court imposed on him violates the equal protection of the state and federal

Constitutions. After the parties filed their briefs in this matter, the Supreme Court issued its decision in *Johnson* and we gave the parties the opportunity to file letter briefs addressing the impact of that opinion on the issues raised in the instant appeal.

In his letter brief, filed on June 23, 2015, Bautista argues only that the *Johnson* decision should not apply retroactively to him because his "case, and certainly his direct appeal, could have gone a different direction if the parties had reason to anticipate that *Hofsheier* would be overruled." However, other than Bautista's reliance on *Hofsheier* as the basis for his equal protection argument on appeal, he does not explain what other actions he took in the trial court or on appeal in justifiable reliance on that case. Accordingly, since his reliance on *Hofsheier* to support an argument on appeal is not the type of "justifiable reliance" the court spoke of in *Johnson*, we apply *Johnson* retroactively to his case and reject his equal protection argument. [2]

DISPOSITION

The judgment is affirmed.

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[2] Alternatively, Bautista contends in his opening brief that he was denied the effective assistance of counsel, if this court concludes that he forfeited the equal protection issue by his defense counsel's failure to object to the registration requirement. Bautista's ineffective assistance of counsel claim is moot in light of our resolution of his equal protection claim on the merits.